

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
Plaintiff,) CIVIL ACTION NO. 96 CIV 01458
)
v.) Filed: June 25, 1996
)
AMERICAN NATIONAL CAN CO.)
)
and)
)
KMK MASCHINEN AG;)
)
Defendants.)
)

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)), the United States of America hereby files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust action against American National Can Co. ("ANC") and KMK Maschinen AG ("KMK").

I.

NATURE AND PURPOSE OF THE PROCEEDING

The government filed this civil antitrust suit on June 25, 1996, alleging that defendants violated Section 1 of the Sherman Act by engaging in a combination and conspiracy that unreasonably restrains interstate trade and commerce in the manufacture of laminated tubes and laminated tube-making equipment, and in the license and transfer of related laminated tube-making technology. The Complaint alleges that this combination and conspiracy

consisted of a series of continuing agreements between defendants, the purpose and effect of which was to eliminate competition between them in the North American markets for laminated tubes and laminated tube-making equipment and technology. Specifically, KMK agreed to sell its laminated tube-making equipment and license its related technology exclusively to ANC; and ANC purchased KMK's U.S. laminated tube-making facility. These agreements harmed competition in several ways:

- (a) They eliminated KMK as a competitor in the laminated tubes market, thereby reducing competition among tube manufacturers in the United States;
- (b) They precluded KMK from selling laminated tube-making equipment or from licensing laminated tube-making technology to persons other than ANC for 15 years, and gave ANC effective control over KMK's existing laminated tube-making equipment in North America, thereby reducing competition among equipment manufacturers in the United States; and
- (c) They gave ANC effective control over KMK's laminated tube-making technology in North America, thereby reducing competition generally in the United States laminated tube, laminated tube-making equipment, and related technology markets.

The complaint seeks: (1) a declaration that these agreements violate Section 1 of the Sherman Act; and (2) an injunction preventing defendants from enforcing, maintaining, or renewing any such agreement or entering into or engaging in any other agreement having a similar purpose or effect.

The United States and the defendants have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered unless the Court finds that its entry is in the public interest.

II.

THE PRACTICES AND EVENTS GIVING RISE TO THE ALLEGED SHERMAN ACT VIOLATIONS

A. The Markets Involved

1. Laminated Tubes

Laminated tubes are collapsible tubular containers of multiple, laminated plastic layers used to package virtually all toothpaste and many pharmaceutical products sold in the United States. These tubes preserve the product within a flexible tube without permitting air or moisture to enter the tube. Other packaging materials either cost more than or lack the barrier characteristics of laminated tubes. Thus, there are no viable economic substitutes for laminated tubes. Annual retail sales of such tubes in North America are about \$110 million, or 1.1 billion tubes, of which approximately 800 million are sold to toothpaste manufacturers; approximately 300 million are sold to pharmaceutical manufacturers and others.

The market for laminated tubes is highly concentrated. Three companies manufacture over 95% of such tubes sold in the United

States. ANC is the largest competitor with total sales comprising over 60% of the United States toothpaste tube market. There are only two other competitors in the United States that have 5% or more of the laminated tubes market. It is not economically feasible to ship laminated tubes into North America.

Successful new entry into, or expansion within, the laminated tube market is difficult. To be successful, a new entrant must acquire expensive laminated tube-making equipment and essential, related patented and unpatented laminated tube-making technology. The up-front investment in plant, machinery, research, technology, and sales is substantial relative to the profit opportunity available in a commodity market like this one.

2. Laminated Tube-Making Equipment

Laminated tube-making equipment consists of machinery used to manufacture laminated tubes. This equipment cannot efficiently be used for any other purpose, nor can other machines easily or efficiently be converted or adapted to make laminated tubes. Thus, there are no viable economic substitutes for this equipment.

The market for laminated tube-making equipment is highly concentrated. Besides KMK, only two companies worldwide currently manufacture such equipment.

KMK is, therefore, one of only a very few firms in the world that can provide laminated tube-making equipment for sale in the United States. KMK has sold such equipment worldwide, and its equipment enjoys a good reputation in the industry. KMK has

numerous patents in countries around the world, including the United States.

Successful new entry into, or expansion within, the market for laminated tube-making equipment is difficult. To be successful, a new entrant must acquire or develop essential patented and unpatented laminated tube-making technology. Such technology is expensive to acquire or develop relative to the sales opportunity for the equipment.

3. Laminated Tube-Making Technology

The use of both patented and unpatented tube-making technology is essential to the profitable manufacture of laminated tubes and laminated tube-making equipment. There are only a few competing forms of such technology today, and KMK, ANC, and an affiliate of ANC's parent hold the rights to three of the four leading types of the technology worldwide.

Development of new competitive technology would require substantial investment with highly uncertain returns. New entry into the laminated tube-making technology market cannot reasonably be expected in the foreseeable future.

B. Illegal Agreements

In 1987, before entering into the agreements discussed below, both ANC and KMK were vertically integrated companies that owned rights to laminated tube-making technology, manufactured laminated tube-making equipment for use in the United States, and manufactured and sold laminated tubes in the United States.

In late 1987, KMK and ANC entered into several agreements,

the purpose and effect of which was to eliminate competition between them in the North American laminated tube and tube-making equipment markets.

Pursuant to one of these agreements ANC purchased Swisspack Corporation, KMK's U.S. affiliate, for just under \$15 million, although the laminated tube-making equipment covered by the transaction was valued at less than \$5 million. As a result of its selling Swisspack to ANC, KMK exited the North American laminated tube market.

On the same day ANC acquired Swisspack, ANC and KMK entered into a License and Technology Assistance Agreement ("LTAA"). Pursuant to that agreement, KMK gave ANC an exclusive license to use KMK's laminated tube-making technology, and an exclusive right to buy its tube-making equipment, in North America ("exclusivity provision"). In exchange, ANC agreed to license any laminated tube-making technology and buy all laminated tube-making equipment for use in North America only from KMK, and not to acquire or use any third party's laminated tube-making equipment or technology there. At or about the time of these agreements, ANC discontinued the manufacture of laminated tube-making equipment. By precluding KMK from selling laminated tube-making equipment or licensing laminated tube-making technology to others in North America, these agreements reduced competition in the North American laminated tube, laminated tube-making equipment, and laminated tube-making technology markets.

Several years after entering into these agreements, ANC was

acquired by Pechiney SA, a French company, one of whose existing subsidiaries, Cotuplas SA, manufactures laminated tube-making equipment. Since being acquired by Pechiney SA, ANC has obtained substantially all its laminated tube-making equipment from the Pechiney SA subsidiary. Until very recently, however, ANC has enforced the exclusivity provisions of the LTAA against KMK, preventing KMK, its equipment, and its technology from competing with ANC in North America. KMK brought these agreements to the attention of the United States and cooperated in its investigation; after learning that the United States had commenced its investigation into these agreements, ANC agreed with KMK not to interfere with KMK's right to sell its laminated tube-making equipment or to license its tube-making technology in North America.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT AND ITS ANTICIPATED EFFECT ON COMPETITION

A. Terms

The proposed Final Judgment provides for injunctive relief that is intended to eliminate any residual anticompetitive effects of the restrictive agreements and other conduct challenged by the Complaint, and to prevent defendants from entering into similar agreements that would have the same effect. Section IV.A of the Final Judgment would terminate the defendants' 1987 LTAA and its exclusivity provisions, thus freeing KMK to sell or license its own laminated tube-making

equipment and technology to anyone in North America. Section IV.B would bar defendants from collecting any payment from each other pursuant to the LTAA for the manufacture, sale, license, or use in North America of laminated tube-making equipment or technology.

Section IV.C of the Judgment would enjoin each defendant from entering certain agreements that restrict the right of any party (i) to use, license, or transfer in North America laminated plastic tube-making technology that the party owns or has the right to use at the time of the agreement, or (ii) to manufacture or sell laminated plastic tubes or tube-making equipment in North America, where such agreements likely would lessen competition among the parties. Such agreements would be barred if (i) at the time of the agreement both parties compete directly against each other in any of the three vertically related laminated plastic tube markets -- i.e., technology, equipment, or tubes, and (ii) the restraint involved applies to that common market.

For example, Section IV.C would prohibit either defendant from entering into an agreement with a tube-making equipment manufacturer that restricted any party from manufacturing or selling tube-making equipment in North America because both parties to such an agreement would be competitors in the tube-making equipment market. Section IV.C would not bar agreements that are essentially vertical in nature. For example, KMK and a company that does not manufacture tube-making equipment could enter into an agreement with KMK granting that company an exclusive right to use KMK's equipment in North America.

Finally, Section IV.C would require that defendants give the Department of Justice notice of, and provide certain discovery rights concerning, any acquisition of a laminated plastic tube competitor that included an agreement not to compete. This notification will enable the Department to investigate and prevent any anticompetitive acquisition, including any transaction that does not require notification under the Hart-Scott-Rodino Act, before it takes place, and thus would prevent these parties from engaging in anticompetitive non-reportable transfers such as their 1987 transaction.

B. Effect on Competition

The proposed Final Judgment will ensure that KMK will be able to compete in all three North American laminated plastic tube markets. KMK will be able to sell laminated plastic tubes, sell or lease tube-making equipment, and license or transfer laminate tube technology. Existing tube manufacturers will benefit from increased competition in the sale of laminate tube-making equipment and technology. New entrants into the North American laminated tube market now will have access to the requisite equipment and technology, which may lead to greater competition in the manufacture and sale of laminated tubes.

To preserve incentives to enter for those firms who may be reluctant to make the requisite investment without exclusive rights to technology or equipment, the injunction against exclusive licenses or otherwise restrictive agreements would apply only to those with persons already competing in the same level of the laminated tube market (technology, equipment, or

tubes) as the defendant.

Similarly, to preserve important incentives to innovate, especially where a defendant is likely to be the primary source of the investment, the injunction would not bar that defendant from acquiring exclusive rights in laminated tube-making technology or equipment that is developed or marketed jointly with customers or suppliers, provided they are not also competitors in the same market level as that defendant.

The injunctive provisions also would exempt restrictions on sale to third parties of equipment made for a particular customer incorporating that customer's own technology.

Finally, prior notice to the Department of any acquisition by a defendant of a laminated tube competitor imposing non-compete obligations would ensure that the Department has an opportunity to get discovery and challenge any such arrangement deemed anticompetitive.

IV.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Judgment has no prima facie effect in any subsequent lawsuits that may be brought against the defendants in this

matter.

V.

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Mary Jean Moltenbrey, Chief, Civil Task Force, U.S. Department of Justice, Antitrust Division, 325 7th Street, N.W., Suite 300, Washington, D.C. 20530, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to a stipulation signed by the United States and defendants, to withdraw its consent to the proposed Judgment at any time prior to entry. Section VII of the proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment.

VI.

DETERMINATIVE MATERIALS/DOCUMENTS

No materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b), were considered by the United States in formulating the proposed Final Judgment. However, a letter, dated June 21, 1996, from plaintiff's counsel to counsel for defendant KMK,

acknowledging KMK's right under current law to seek relief from the compliance provisions of Section VI in the event it believes a conflict has arisen between any request for information or documents under those provisions and foreign law, was considered determinative by KMK in agreeing to the proposed Judgment and is attached hereto as Exhibit A.

VII.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment is a full trial on the merits. While the Department is confident it would succeed in such a trial, this case involves difficult issues of law and fact, as well as obvious risks and costs to the United States, and success is not certain. The Final Judgment to which the parties have agreed provides virtually all the relief the government sought in its complaint, and that relief will fully and effectively open the markets involved to competition.

Dated: June 25, 1996

Respectfully submitted,

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June 21, 1996

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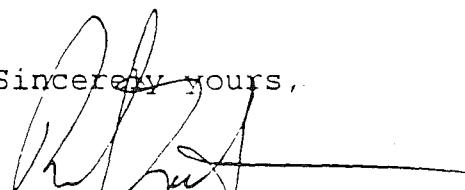
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Re: KMK Maschinen AG/Laminated Tubes

Dear Mr. Jetton:

During our negotiations of a consent decree in this case, you suggested the possibility that a conflict could arise between the compliance provisions in Section VI of the proposed decree, which authorize the Assistant Attorney General to inspect documents or conduct interviews and to request written reports, and laws or orders of foreign governments, which appear to prohibit compliance with such provisions. Of course, we would attempt to work with KMK to avoid any such conflict in exercising our rights under Section VI. In the event that we could not reach agreement with you, however, KMK would be free to seek relief from the decree court from its obligations to comply with any Section VI request. Under the principles set forth in Societe Internationale v. Rogers, 357 U.S. 197 (1958) and its progeny, KMK would have the burden of showing that (1) compliance with the request is prohibited by foreign law, (2) KMK was not in any way responsible for creating the conflict between the judgment and foreign law, and (3) KMK has exercised its best efforts to obtain any waiver or permission from the foreign government and other relevant person(s) that would enable it to comply with the request.

Sincerely yours,


Robert J. Zastrow
Assistant Chief
Civil Task Force

CETIFICATE OF SERVICE

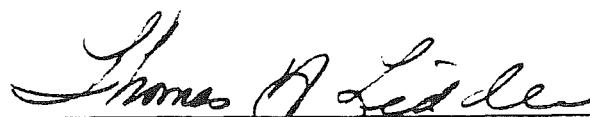
I hereby certify that copies of the foregoing Complaint, Stipulation (to which is attached a copy of a proposed Final Judgment), and Competitive Impact Statement were served this 23rd day of June 1996, by first class mail, postage prepaid, upon:

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